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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 861

BROTHERHOOD OF RAILROAD TRAINMEN,
SWITCHMEN'S UNION OF NORTH AMERICA, *Petitioners*

v.

THE AKRON & BARBERTON BELT RAILROAD COMPANY,
ET AL., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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TABLE OF CONTENTS

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	4
Statement	4
Reasons for Granting the Writ	10
I. The question of the work rules to be in effect upon the expiration of the Award of Arbitration Board No. 282 involves an important issue affecting the employment rights of thousands of persons and which was decided erroneously by the Court below	10
II. Whether parties subject to the Railway Labor Act may effectually make agreements of limited duration presents an important question of the construction of the Railway Labor Act which ought to be decided by this Court	14
III. The Court below was clearly in error in holding that the Award of Arbitration Board No. 282 did not expire at the end of January 24, 1966	18
IV. The Court below was clearly in error in holding that the correspondence between the Richmond, Fredericksburg & Potomac Railroad Company and the Brotherhood of Railroad Trainmen constituted a crew-consist agreement of the same duration as an award of a special board of adjustment	22
Conclusion	24
Appendices (contained in a separate document):	
Appendix A (District Court Opinion of March 3, 1966)	2a
Appendix B (District Court Opinion of March 28, 1966)	16a
Appendix C (District Court Opinion of April 19, 1966)	25a

Page

Appendix D (District Court Opinion of May 19, 1966) 30a

Appendix E (Court of Appeals Opinion of May 12, 1967) 33a

Appendix F (Court of Appeals Opinion of July 31, 1967) 75a

Appendix G (Court of Appeals Judgment of July 31, 1967) 91a

Appendix H (Court of Appeals Memorandum and Order of September 21, 1967) 92a

Appendix I (Award of Arbitration Board No. 282) 95a

Appendix J (Statutes Involved) 111a

TABLE OF CITATIONS

CASES:

Brotherhood of Locomotive Engineers v. Chicago, Rock Island and Pacific R.R., 382 U.S. 423 (1966) 11

Brotherhood of Locomotive Firemen and Enginemen, et al. v. Chicago, Burlington & Quincy R.R., et al., 255 F. Supp. 11 (D.D.C. 1964) aff'd. 331 F. 2d 1020 (D.C. Cir. 1964), cert. den. 377 U.S. 918 .. 4

STATUTES:

28 U.S.C. § 1254(1) 2

Public Law 88-108, 77 Stat. 132 .....*passim*
Section 1 5
Section 2 5
Section 4 .....5, 11
Section 5 ..... 5, 7
Section 8 5

Railway Labor Act, 45 U.S.C. §§ 151-164
Section 6 .....3, 4, 16, 17
Section 10 5

MISCELLANEOUS:

Hearings Before the Committee on Commerce, U.S. Senate, 89th Cong., 1st Sess., On the Administration of Public Law 88-108 10

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The Petitioners, Brotherhood of Railroad Trainmen and the Switchmen's Union of North America, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on July 31, 1967.[1]

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[1] The opinions and judgment of the Court of Appeals encompassed a number of cases pending before that Court, involving the parties to this petition in some cases, and other parties in other cases, and involving related questions. This petition seeks review of the judgment of the Court of Appeals in the case designated by that Court as Appeal No. 20,152.

OPINIONS BELOW

The opinions of the District Court (Appendices A and B)[2] are reported at 250 F. Supp. 691 and 252 F. Supp. 207. The opinion and supplemental opinion of the Court of Appeals (Appendices E and F) have not yet been officially reported.[3] They are unofficially reported at 65 LRRM 2229 and 65 LRRM 2995.

JURISDICTION

The judgment of the Court of Appeals (Appendix G) was dated and entered on July 31, 1967. On October 16, 1967, the time for filing this petition was extended to November 28, 1967 by order of this Court. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether rules relating to the manning of train crews in road and yard service (commonly known as "crew consist" rules), which were established by or pursuant to the Award of Arbitration Board No. 282 convened under Public Law 88-108, or by agreements entered into during the period of the Award which specified that such rules were to remain in effect to the same extent and for the same period as rules estab-

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[2] The appendices to this petition are contained in a separate document which has been filed in this Court in common by three of the parties filing petitions for writ of certiorari to review the judgment of the Court below.

[3] On September 21, 1967, the Court of Appeals issued a third opinion. (Appendix H) It is unofficially reported at 66 LRRM 2268. Although it nominally refers only to the appeals involving the Brotherhood of Locomotive Firemen and Enginemen, it is pertinent also to the case of the Petitioners.

lished pursuant to the Award, continue in effect after the expiration of the Award notwithstanding the language of Public Law 88-108 that the award of the arbitration board was to continue in force for a period "not to exceed two years from the date the award takes effect", notwithstanding the legislative history of that Act which shows the Congressional intent that the rules remain in effect only for two years, and notwithstanding the language of the Award that it was to "continue in force for two years from the date it takes effect."

2. Whether Section 6 of the Railway Labor Act requires that crew-consist rules that were modified pursuant to agreements entered into during the effective period of the Award of Arbitration Board No. 282 and which provided that they were to remain in effect only for a limited specified duration nevertheless continue in effect after the expiration of the specified period.

3. Whether the Award of Arbitration Board No. 282, which became effective with respect to the Petitioners at the expiration of January 24, 1964, and which was to remain in effect for a period "not to exceed two years," terminated at the end of January 24, 1966 or at the end of January 25, 1966, when the starting date did not involve problems of a fraction of a day.

4. Whether the exchange of certain correspondence between one of the Respondent railroads (Richmond, Fredericksburg & Potomac) and one of the Petitioners (Brotherhood of Railroad Trainmen) constituted an agreement establishing a change in prior crew-consist rules, when the parties never agreed on the duration of the agreement.

STATUTES INVOLVED

The pertinent provisions of Public Law 88-108 (77 Stat. 132, 45 U.S.C. § 157 (1966 Supplement)) and the Railway Labor Act (48 Stat. 1185, 45 U.S.C. §§ 151-164) are set forth in Appendix J. The provisions of the Award of Arbitration Board No. 282 are set forth in Appendix I.

STATEMENT

On August 28, 1963, following almost four years of failure by most of the railroads, including the Respondents, and the five operating unions, including the Petitioners, to settle their dispute concerning the manning of trains, Congress enacted Public Law 88-108. The dispute involved, *inter alia,* two separate manning issues. The first issue concerned the use of firemen (helpers) on diesel locomotives (R 4); and the second issue concerned the consist of train crews in road and yard service. (R 3) It is the latter issue that involved employees represented by the Petitioner.

The history of the crew-consist dispute is set forth in detail in *Brotherhood of Locomotive Firemen and Enginemen, et al.* v. *Chicago, Burlington & Quincy R.R., et al.,* 255 F. Supp. 11 (D.D.C., 1964), *aff'd.* 331 F. 2d 1020 (D.C. Cir. 1964), *cert. den.* 377 U.S. 918. In brief, on November 2, 1959, most of the railroads in the country served notices under Section 6 of the Railway Labor Act (45 U.S.C. § 156) of their intent to abolish all rules concerning crew consist and on September 7, 1960, the unions served counter Section 6 notices proposing different crew-consist rules. The dispute was not settled by negotiations between the parties either locally or on the national level. (R 4-5) Thereafter, spanning a period of several years, a Pres-

idential Railroad Commission was appointed by the President of the United States to investigate and report on the controversy, the mediatory services of the National Mediation Board were invoked and exhausted, and the President of the United States, acting under Section 10 of the Railway Labor Act (45 U.S.C. Section 160), appointed an Emergency Board to investigate and report concerning the dispute. (R 5) No agreement was reached. The matter came to a head in July and August 1963 when the railroads announced that they intended unilaterally to put in effect the proposal in their November 2, 1959 notices and the unions announced that a strike would be called if the railroads did so. (R 21) To prevent such unilateral action by the railroads and its consequent strike by the unions, Public Law 88-108 was enacted. (R 21; Appendix J.)

Section 1 declared that neither the railroads nor the unions could make any changes in the status quo except by agreement or pursuant to the arbitration award provided for in the Act as to any matters which were the subject of the Section 6 notices of November 2, 1959 and September 7, 1960.

Section 2 of P.L. 88-108 provided for the creation of an arbitration board. Section 4 provided that its award was to continue in force for such period as the arbitration board should determine in its award, "but not to exceed two years from the date the award takes effect, unless the parties agree otherwise." Section 5 of the Act provided that the award was to become effective 60 days after filing the award.

Section 8 provided that the Act would expire 180 days after its enactment, except that it would remain in effect with respect to the last sentence of Section 4 (which dealt with the duration of the arbitration award) for

the period prescribed in that sentence (i.e., "not to exceed two years from the date the award takes effect, unless the parties agree otherwise.")

Pursuant to the provisions of P.L. 88-108, a board of arbitration was convened, which became known as Arbitration Board No. 282. The Board issued its Award on November 26, 1963. (R 41; Appendix I) Section I of the Award provided that its determination with respect to the crew-consist issue was to be a full disposition of the issue of crew consist involved in the parties' Section 6 notices of November 2, 1959 and September 7, 1960. Section II concerned the disposition of the issue concerning the use of firemen (helpers) on other than steam power locomotives.

Section III of the Award dealt with the crew-consist dispute. Section III A(1) remanded the crew-consist issue to the parties for negotiations on the local properties but pending the consummation of local agreements provided that certain interim rules should apply.

Section III A(3) provided that either party could give notice to the other of any proposed change in the preexisting crew-consist rules, and that following such notice the parties were thereafter to meet in an attempt to reach agreement on the notice. Section III Part B(1) provided that if no agreement was reached the issue involved could be referred by either party to a "special board of adjustment". Section III Part B(3) provided that the determination by the special board of the dispute was to be binding on the parties.

Section IV of the Award provided that the Award was to "continue in force for two years from the date it takes effect, unless the parties agree otherwise." Arbitration Board No. 282 filed its Award on November

26, 1963, and in accordance with Section 5 of P.L. 88-108, the Award became effective commencing with January 25, 1964. (R 9)

Utilizing Section III of the Award, almost all the Respondents served notices on the Petitioners of their proposed changes in the preexisting crew-consist rules. Negotiations were conducted on the local properties and in many instances agreements were reached. These agreements varied with respect to the duration of the agreements. (R 65-70) In many other instances agreement was not reached and the disputes were referred to special boards of adjustment, as provided in Section III of the Award, and awards were issued. (R 62)

On January 19, 1966, 178 railroads[4] filed a complaint for declaratory judgment and injunctive relief against the Petitioners and the Order of Railway Conductors and Brakemen requesting the District Court to declare that the rules and procedures established by or pursuant to the Award of Arbitration Board No. 282, whether by way of awards of special boards or through agreements, continued in effect upon the termination of the Award until changed by agreement or until the procedures provided by the Railway Labor Act have been exhausted with respect to notices proposing changes in such rules and procedures. (R 2-17) On February 16, 1966 the Petitioners filed their Answer and Counterclaim in which they requested the Court to declare that the rules which were modified by or pursuant to the Award were again in effect upon the termination of the Award.

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[4] On February 3, 1966, the railroads filed a Notice of Dismissal by Certain Plaintiffs dismissing the action with respect to 33 of the railroads. (R 17)

On March 3, 1966 the District Court delivered its first opinion. (R 153-167; Appendix A) The Court held that upon the termination of the Award no further proceedings could be taken under the Award. However, the Court held that rules established under the Award created a "new plateau" and that such rules continued in effect following the termination of the Award.

On March 25, 1966 a final hearing was held. The purpose of the hearing was to determine the application of the Court's March 3, 1966 rulings to specific situations, such as the effect of the termination of the Award on agreements entered into during the period of the Award and on proceedings initiated before the termination of the Award but not completed at the time the Award expired. The parties filed an extensive Stipulation As To Facts, together with exhibits, and no further evidence was introduced. (R 62-111) On March 28, 1966, the District Court rendered its oral opinion with respect to these remaining issues (R 167-174; Appendix B), and on April 6, 1966 entered judgment with respect to all issues. (R 175-181)

The District Court found that the rules established pursuant to the awards of special boards of adjustment continued in effect upon the expiration of the Award, and that, with the exception of three agreements, all agreements made during the period of the Award were to be treated as if they were awards of special boards of adjustment and the agreements also continued in effect upon the expiration of the agreements. The District Court further held that the Award expired at the end of January 25, 1966 solely because the parties had on several occasions referred to that date as the expiration date.

The Court of Appeals affirmed the holdings of the District Court set forth above. It based its legal underpinning that the rules created by the awards of special boards and the agreements of limited duration continued in effect upon the expiration of the Award of Arbitration Board No. 282 and the expiration of the agreements "not [on] the Joint Resolution which expired after 180 days of life," not "on the Award, which had only a 2-year life," and not because of "any agreement of the parties." (App. p. 45a) Rather, the Court's rationale was that the Railway Labor Act required such result. The Court stated (App. p. 45a):

> "The mandate of the Railway Labor Act requires that the work rules in effect on any particular day shall also be in effect the following day—beyond the power of either party to institute a unilateral modification—subject to change only in accordance with the procedures prescribed by the Act. . . . This new-plateau reasoning applies even though the work rules are established by agreements of limited duration. . . . It likewise applies even though the work rules are established by an arbitration award of limited duration."

With respect to the issue of the date the Award expired, the Court of Appeals, in its first Opinion (App. p. 40a), reversed the District Court and held that the Award expired at the end of January 24, 1966. In its Supplemental Opinion, however, the Court of Appeals reversed itself and found that the Award expired at the end of January 25, 1966. (App. p. 86a) The Court explained its earlier ruling that the Award expired January 24, 1966, on the ground that the starting date of the Award did not involve the problem of a fractional day. The Court concluded, however, that it felt compelled to reject its own reasoning because of a "horn-

book learning to the effect that where there is doubtful language in a statute the courts prefer that will confirm rather than destroy any bona fide transaction or title," and that since a special board of adjustment rendered an award on January 25, 1966, its construction should be given effect (App. p. 85a) without there being any indication that the special board had given any construction or any consideration to the "two years" provision.

REASONS FOR GRANTING THE WRIT

I. The question of the work rules to be in effect upon the expiration of the Award of Arbitration Board No. 282 involves an important issue affecting the employment rights of thousands of persons and which was decided erroneously by the Court below.

Utilizing the provisions of the Award of Arbitration Board No. 282, the Respondents, within the space of two years, and with a zeal unimagined by Arbitration Board No. 282,[5] extinguished the employment rights of 18,000 employees under the part of the Award dealing with the use of firemen (helpers) on diesel locomotives, and received authorization to discontinue approximately 7,574 job assignments under the part of the Award dealing with crew consist. (R 142)

The Petitioners contended in the Court below that based upon the language of Public Law 88-108, its legislative history, the language of the Award of Arbitration Board No. 282, and a decision of this Court, the only conclusion that could be drawn was that both the Congress and the Arbitration Board intended that the work rules created by or pursuant to the Award

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[5] Testimony of Ralph T. Seward, Chairman of Arbitration Board No. 282, in Hearing Before the Committee on Commerce, U.S. Senate, 89th Cong., 1st Sess., *On the Administration of Public Law 88-108*, pp. 363-364.

were to be interim rules only and were intended to remain in effect only for the period that the Award was effective and that upon the expiration of the Award the prior agreed-to rules that were modified by the Award were automatically again in effect, absent agreement to the contrary.

The Petitioners pointed to the language of Section 4 of Public Law 88-108 which provided (App. p. 114a):

> "The award shall continue in force for such period as the arbitration board shall determine in its award, but not to exceed two years from the date the award takes effect, unless the parties agree otherwise."

And to Section IV of the Award of Arbitration Board No. 282 which provided (App. p. 110a):

> "This Award shall continue in force for two years from the date it takes effect, unless the parties agree otherwise."

The Petitioners also cited numerous statements of representatives of the Administration proposing the legislation and the parties to the dispute taken from testimony given at the hearings before the House and Senate committees considering the legislation that became Public Law 88-108, the reports of the Senate and House committees reporting the bill, and numerous statements of members of the Congress during the floor debates on the legislation, all to the effect that the work rules created pursuant to the legislation would continue in effect only for a two-year period at the most.

Finally, the Petitioners cited the opinion of this Court in *Bhd. of Locomotive Engineers* v. *Chicago, R.I. & P.R.R.*, 382 U.S. 423 (1966), wherein this Court,

in discussing the Award of Arbitration Board No. 282, stated (at 433):

> "Their award was to be a complete and final disposition of these issues for a period not exceeding two years from the date the award would take effect . . . .
>
> ". . . Congress wanted to do as little as possible in solving the dispute which was before it . . . ."

Notwithstanding all the evidence to the contrary, the Court of Appeals rejected the position of Petitioners on the ground that the legislative history was unclear on the subject. The Court referred to no provision of Public Law 88-108, the Award, or to any legislative history, to support its conclusion that there was doubt of the intent of Congress or the Arbitration Board as to the maximum period the rules created pursuant to the Award would be in effect. Indeed, the Court conceded that the approach of the Petitioners:

> "has a kind of formal logic, and certain provisions of Public Law 88-108 could be read this way." (App. p. 45a)

The Court made no attempt to reconcile its holding that the work rules established by the Award were to be controlling for a *minimum* period of two years and that the rules thus established created a "new plateau" which was to continue upon the expiration of the Award, with the clear mandate of Congress that the Award was to remain in effect for a period "not to exceed two years", or with the Award which provided that it was to "continue in force for two years from the date it takes effect."

We are aware that a petition for certiorari is not the proper place for a detailed argument on the merits. For this reason we have omitted the numerous references to the legislative history of Public Law 88-108

which support our position. Our purpose here is only to show that there is at least a serious doubt that the Court of Appeals was correct in its construction of the statute and the Award. When such doubt is coupled with the great impact such determination had upon the employment rights of thousands of persons, we believe such determination is the proper subject of review by this Court.

We further submit that review is necessary because the Court of Appeals itself was not at all sure of the correctness of its determinations. The confusion and uncertainty of the Court below is apparent from the fact that the Court found it necessary to issue from time to time three separate opinions. The first opinion (Appendix E), of 41 pages, concluded with the unusual direction that the parties submit proposed judgments to the Court of Appeals with leave to the parties to "request supplemental rulings on any matters that have not been discussed in this opinion."

The result of this unusual request was a second opinion (Appendix F), of 19 pages, containing clarifications of prior rulings, a reversal of at least one ruling made in the first opinion which in turn had reversed a ruling of the District Court, and rulings on several additional matters not mentioned in the first opinion. These two opinions, however, still were found insufficient to resolve the matter and a third opinion issued. (Appendix H.)

In this final opinion, if indeed it be the final opinion, the Court practically conceded that it was uncertain whether its prior decisions were correct, and, in effect, invited Arbitration Board No. 282 to render its opinion with respect to the various rulings of the Court. The Court stated (App. p. 93a.)

> "It is Ordered by the court that the carriers petition of August 15, 1967 is denied, without prej-

udice however to the Board's seeking leave within thirty days from the date of this order to submit as amicus curiae a showing of respects, if any there be, in which the opinions of this court are inconsistent with the understanding of Board 282 as to the proper meaning and applicability of its award."

On September 12, 1967, the National Mediation Board sent telegrams to all persons who had been members of Arbitration Board No. 282 reconvening the Board to "consider what action if any to take in light of the memorandum and order" of the Court of Appeals. On October 19, 1967, Arbitration Board No. 282 advised the Court that it declined to file a brief amicus.

In any event, the correctness of the decision of the Court below adversely affecting such a very large number of persons, should not have been dependent on whether Board 282 agreed with the Court of Appeals' conclusions. The only forum which has the statutory power to review such decisions is this Court, and, we submit, in light of the confusion and uncertainty of the Court below, this Court should exercise such power of review.

II. Whether parties subject to the Railway Labor Act may effectually make agreements of limited duration presents an important question of the construction of the Railway Labor Act which ought to be decided by this Court.

Question No. 2 presents the issue of whether parties subject to the Railway Labor Act may effectually enter into an agreement pursuant to which the agreement will expire on a day certain with its terms no longer to have any force or effect after the expiration date. The Court below held that the parties may not do so effectively and that the consequence of the Railway Labor Act is "to prolong agreements subject to its

provisions regardless of what they say as to termination." (App. p. 46a.)

The issue arose in this case in the following manner. Section III A(3) of the Award of Arbitration Board No. 282 provided that either party to the Award could give notice to the other of any proposed change in the preexisting crew-consist rules and that following such notice the parties were to meet in an attempt to reach agreement on the notice.

Approximately 95 agreements were entered into following such negotiations. The agreements varied considerably with respect to the dates on which they were to terminate. The parties were able to stipulate that, with the exception of 13 agreements, all agreements could be classified within one of five categories. (R 65-66) The instant question is not concerned with the agreements in these categories.

The parties could not agree on a category for the remaining 13 agreements, however, and these were presented individually to the Courts below for consideration.[6] The Petitioners contended, with respect to these

[6] The relevant portions of these agreements are set forth in paragraph F of the Stipulation as to Facts entered into between the parties in the District Court. (R 66-70) Actually, only 10 agreements were presented to the Court of Appeals for adjudication. The District Court upheld the position of the Petitioners with respect to three of the agreements. With respect to these three agreements the District Court held that the prior crew-consist rules again became effective because these agreements "contain an express provision to the effect that upon their expiration the prior rule as to crew consist would again be in full force and effect." The Respondents did not appeal from this ruling. Under the reasoning of the Court of Appeals, however, it may be that if they had appealed, the Court would have reversed the District Court on the ground that a Section 6 notice was required to return to the old rules notwithstanding the express provisions of such agreements to the contrary.

agreements, that each agreement showed the intent of the parties that the crew-consist rules established pursuant to the agreement were intended to be in effect only for the limited period of the agreement and that upon its expiration, the prior agreed-upon crew- consist rules were again to be in effect.

The Court of Appeals rejected the Petitioners' contention holding that Section 6 of the Railway Labor Act superseded the intent of the parties and, regardless of what the parties intended, the agreements continue in effect until the procedures of the Railway Labor Act for changing agreements are resorted to. The Court stated (App. pp. 45a-46a.)

> "The mandate of the Railway Labor Act requires that the work rules in effect on any particular day shall also be in effect the following day—beyond the power of either party to institute a unilateral modification—subject to change only in accordance with the procedures prescribed by the Act. These procedures begin with the notices required by Section 6 to be served by any party seeking a change at least thirty days in advance of the proposed effective date of such change. This new plateau reasoning applies even though the work rules are established by agreements of limited duration. The effect of § 6 is to prolong agreements subject to its provisions regardless of what they say as to termination." [17]

[17] Manning v. American Airlines, Inc. *supra*, note 15, 329 F.2d at 34.

For example, the agreement with the Kansas City Southern provided (R 67-68):

> "This agreement does not affect schedule rules . . . in effect on the day preceding the effective date of this agreement except . . . for the period this agreement remains in effect . . . This agreement . . . shall remain in effect until January 25, 1966 . . . ."

Yet the Court below held that the agreement remained in effect after January 25, 1966 and that the "schedule rules . . . in effect on the day preceding the effective date of" the agreement continued to be modified after January 25, 1966 despite the express agreement of the parties to the contrary.

We submit that the error of the Court of Appeals is evident from its own analysis. Thus, the Court began its analysis by referring to the fact that Section 6 of the Railway Labor Act requires that notice be served whenever a party seeks "to institute a unilateral modification" of an existing agreement. There is no question that the Court below is correct on this point and that a Section 6 notice is required whenever one of the parties to an agreement desires to change the existing collective bargaining agreement. Under such circumstances, a notice is required so that the other party to the agreement is made aware of the proposed change in order that negotiating conferences can be scheduled to discuss the proposal, and so that, if no agreement can be reached on the property, the dispute may be referred by any of the parties to the National Mediation Board for its mediatory services in attempting to settle the dispute.

Immediately following this statement, however, the Court below concluded, from the fact that a notice is required when a "unilateral modification" is intended, that "the effect of § 6 is to prolong agreements subject to its provisions regardless of what they say as to termination."

We fail to find any provision in Section 6 that would require notice to be served when both parties to the agreement state in the agreement that it shall remain

in effect for a certain period, and not thereafter. In such situation, the expiration of the agreement does not constitute a unilateral modification of the agreement but rather the culmination of what the parties had agreed. Here, since the parties to the agreements involved specified that crew-consist rules be in effect only until a specified date, the revival of the rules in effect prior to such agreements is not a *change* in such agreements but is part of such agreements.

III. The Court below clearly was in error in holding that the Award of Arbitration Board No. 282 did not expire at the end of January 24, 1966.

The question of whether the Award of Arbitration Board No. 282 expired at the end of January 25, 1966 is relevant only to two of the Respondents. On January 25, 1966 a special board of adjustment rendered an award with respect to a dispute between the Green Bay and Western Railroad Company, the Kewanee, Green Bay and Western Railroad Company, and the Brotherhood of Railroad Trainmen. (R 63) The Court of Appeals' determination of this issue is, perhaps, the outstanding example of the confused and uncertain handling of this case by that Court.

The District Court had held that the Award of Arbitration Board No. 282 expired at the end of January 25, 1966 and therefore the special board award was valid, simply because the Court and the parties often referred to the Award as expiring on that date. (R 151)

In the first opinion of the Court of Appeals the Court reversed the District Court, noting (App. p. 40a):

> " "The parties and the District Court have all accepted and implemented the Award as effective January 25, 1964. With that date marking the first day of the two year period it is clear that the

> full two-year period expired at the end of January 24, 1966. We see no valid basis for the assumption of the District Judge that the Award was in existence on January 25, 1966."

The Court concluded that the award of the special board issued on January 25, 1966 was invalid.

The Court of Appeals changed its mind in its second opinion, follwoing a request by the Respondents for a rehearing of the issue. The Court pointed out, however, that its reason for reversing itself was not based on any argument put forth by Respondents. The Court stated (App. pp. 84a-85a):

> "On rehearing the carriers point out decisions interpreting statutory provisions that an act be done within a specified period from the date of another action or event so that the initial or trigger date is excluded from the computation . . . .We thought this rule inapplicable because the starting date did not involve problems of a fractional day, and was in turn determined by a still earlier computation beginning with an initial date that was concededly excluded from the computation. This led us to view that the two-year period prescribed by the Act as the life of the Award did not extend beyond 731 full days (two years of 365 days each, plus February 29, 1964) and that the Award which started at 12:01 a.m. on January 25, 1964, should not be stretched to include the 732nd day of January 25, 1966. We felt that in this peculiar setting of this law that legislative consideration should prevail over the customary formula for computing time."

Notwithstanding "legislative consideration" the Court nevertheless found that the special board award was valid. The basis of the decision was (App. p. 85a):

> ". . . hornbook learning to the effect that where there is doubtful language in a statute for per-

formance of an act, the courts prefer that which will confirm rather than destroy any bona fide transaction or title. 52 Am. Jur. *Time* § 18 (1944).

". . . When the special board assumed that it had authority to act on January 25, 1966, it must be presumed to have considered the question carefully and with a view to conforming to the intent of Congress as nearly as it could discern that intent."

There is not a word anywhere to substantiate such presumption.

The Court below took pains to reject the Respondents' contentions, concluding that the effective date of the Award did not involve a fractional day, that the Award should not be stretched to include an additional day, and that legislative consideration should prevail over the customary formula for computing time. It then discarded its entire analysis, finding "doubtful language in a statute." What doubtful language? The careful analysis of the Court shows that there is no doubtful language at all on this subject.

The third opinion of the Court of Appeals shows its uncertainty. In the third opinion, the Court refers to its holding on this point and immediately thereafter orders that its mandate be stayed to permit Board 282 to advise in what respects, if any, "the opinions of this court are inconsistent with the understanding of Board 282 as to the proper meaning and applicability of its award." (App. p. 93a.)

On October 19, 1967, Board 282 advised the Court below that it would not take advantage of the Court's offer. (See p. 14, *supra*. If it had, however, we have no doubt of what it would have had to say on this point. The fact is that Board 282 consistently took the posi-

tion that it would not determine questions of a legal nature concerning the termination date of the Award or the effect of the termination of the Award. For example, on June 9, 1964, Arbitration Board No. 282 rendered a response to a question which had been submitted to it by the Switchmen's Union of North America. The question of SUNA and the answer of Board 282 are, in pertinent part, as follows:

> "Question III. In the event the Carriers serve notice under Caption III Consist of Road and Yard Crews, . . . or if procedures under Part B are not completed or decisions of special boards of adjustment have not been rendered under B-3 on the date Arbitration Board No. 282 terminates:
>
> "Do all procedures terminate on the date the Board terminates?
>
> "Are all decisions which may be rendered by a neutral subsequent to the date the Board terminates void?
>
> "Answer: These questions do not call for an interpretation of the Board's Award. They call for an opinion as to the legal situation which exists following the termination of the Board's Award. The Board therefore lacks jurisdiction to answer them."

Since Board 282 took the position that it did not have jurisdiction to determine questions of a legal nature there can be no doubt that it did not intend that special boards of adjustment deliberate or rule on the matter. The Court below clearly was in error both in presuming that the special board "considered the question carefully," and in giving any weight to the coincidental fact that the award of the special board issued on January 25, 1966.

IV. The Court below was clearly in error in holding that the correspondence between the Richmond, Fredericksburg & Potomac Railroad Company and the Brotherhood of Railroad Trainmen constituted a crew consist agreement of the same duration as an award by a special board of adjustment.

Should this Court decide to review the basic determinations of the Court below, we request this Court to review also the lower Court's holding with respect to the issue involving the Richmond, Fredericksburg & Potomac Railroad Company. ("RF&P") and the Brotherhood of Railroad Trainmen, which holding violates the most fundamental principles of contract law.

The issue is whether certain correspondence between the RF&P and the Brotherhood constituted a crew-consist agreement. The Brotherhood's position is that the correspondence clearly shows that the parties could not agree and no agreement was made. The correspondence was included in the Stipulation as to Facts (R. 80-90).

Although the issue was thoroughly briefed and argued by counsel for the parties, the first opinion of the Court below ignored the issue entirely. The Brotherhood called the Court's attention to this fact and in the Supplemental Opinion of the Court of July 31, 1967, the Court ruled on the issue. The Court held (App. p. 90a, fn. 6) that the correspondence constituted a crew-consist agreement of the same duration as an award by a special board of adjustment. We submit that the holding of the Court below was so clearly in error, that if this Court determines to review any aspect of the case, it should not permit this determination to stand.

The last correspondence on the matter between the RF&P and the Brotherhood plainly shows the gulf

separating the parties and their failure to enter into a binding agreement. On November 9, 1964, the representative of the Brotherhood sent a letter to the RF&P which concluded with the following paragraph (R. 89-90):

> "The effective date of this agreement forced upon us is November 15, 1964, and as far as I am concerned, it expires on January 25, 1966 unless we agree otherwise in accordance with Article IV, Duration of Award Arbitration Board No. 282 and at present I do not agree otherwise."

The RF&P's response is dated November 12, 1964. The carrier's letter states (R. 90):

> "On November 15, 1964, that agreement will be placed in effect with the understanding that there is a difference between the parties on the duration of the agreement. The opinion of the RF&P on the issue of agreement duration is outlined in my letter to you of November 5, 1964, while your opinion is expressed in your letter to me of November 9, 1964.
>
> "As far as the RF&P is concerned this concludes our handling of the subject agreement at this time."

Thus, at the termination of the correspondence the situation existing was that both parties believed that they were making an agreement but not the same agreement. The Brotherhood stated it was making an agreement which by its terms was to expire on January 25, 1966 whereupon the prior crew-consist rules were again to become effective. The RF&P, on the other hand, stated it was making an agreement which would be the same as any other agreement made by the parties which

does not include a specific termination date. This difference persisted through all the correspondence which the Court below found to constitute an agreement.

CONCLUSION

At least some of these issues are of far-reaching effect and apparently decided erroneously by the Court below. It is urged that this petition be granted.

Respectfully submitted,

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